SAMBAGA VALLI KR PONNUSAMY v. DATUK BANDAR KUALA LUMPUR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: S-21-159-2008]
30 MARCH 2016

CIVIL PROCEDURE: *Appeal – Appeal against Registrar's order – Assessment of damages – Whether Registrar made wholly erroneous estimate of damages – Unresolved issues regarding financial statements of plaintiff's company – Whether damages assessed ought to be reduced – Defendant's actions infringed upon constitutional rights of plaintiff – Whether justified award of exemplary damages – Emotional state of witness – Whether relevant consideration for purposes of ascertaining aggravated damages – Award for pre-judgment interest – Whether Registrar's finding could override earlier decision of trial judge*

DAMAGES: *Assessment – Registrar's order – Appeal against – Whether Registrar made wholly erroneous estimate of damages – Unresolved issues regarding financial statements of plaintiff's company – Whether damages assessed ought to be reduced – Defendant's actions infringed upon constitutional rights of plaintiff – Whether justified award of exemplary damages – Emotional state of witness – Whether relevant consideration for purposes of ascertaining aggravated damages – Award for pre-judgment interest – Whether Registrar's finding could override earlier decision of trial judge*

This was a cross-appeal from the decision of the Registrar of this court in assessment proceedings. Briefly, the plaintiff carried on a business of trading in scrap metal and second hand goods, on premises rented from the Kuala Lumpur City Hall Workers Union. She had obtained the requisite license from the Royal Malaysian Police and an exemption certificate to operate a second hand goods business under the Second-Hand Dealers Act 1946. However, she did not obtain any business licence, permit or consent from the second defendant, Datuk Bandar Kuala Lumpur ('DBKL'), nor did she have any approval to construct any structure on the land on which she ran her business. DBKL gave the plaintiff several enforcement notices, requiring her to demolish the structures, failing which enforcement action would be taken against her. On 16 January 2008, the defendants carried out the enforcement action, and demolished the structures located on the land and seized certain assets of the plaintiff. The plaintiff sued the defendant for trespass, conversion and detinue, negligence, breach of statutory duty, conspiracy and misfeasance in public office. At the trial to determine liability, the judge found for the plaintiff and ordered damages to be assessed. Before the Registrar, damages were assessed as follows (i) special damages at RM2,012,100; (ii) general damages at RM2,000,000; (iii) aggravated damages at RM2,000,000 and (iv) exemplary damages at RM1,503,025. The

defendants appealed against the decision of the Registrar, and the plaintiff cross-appealed against the decision of the Registrar to refuse the award of pre-judgment interest. The issues that arose were, *inter alia*, (i) whether the financial statements were prepared based on information or explanations by the illiterate plaintiff and were prepared based on hearsay; (ii) whether there were unresolved questions regarding the financial statements of the plaintiff; (iii) whether the Registrar had made a wholly erroneous estimate of the damages suffered; (iv) whether the award of both exemplary and aggravated damages was wrongly given; (v) whether Registrar was wrong to have taken into account the emotional state of the plaintiff; and (vi) whether the decision of Registrar not to award pre-judgment interest ineffective.

Held (allowing plaintiff's appeal; allowing defendants' appeal in part):

(1) The financial statements were prepared by PW1, an accountant that has a professional duty to ensure that the accounts give a true and fair view of the affairs of the plaintiff. The literacy or otherwise of the owner of the business is not a material consideration, because an accountant would be expected to adhere to the applicable financial reporting standards. In any event, the preparation of the accounts of a business are not subject to the rules of evidence, and the fact that they were prepared based on information provided by the relatives of the plaintiff did not in any way detract from their status as a financial record of the affairs of the plaintiff, or the ability of PW1, as the accountant who had prepared the financial statements, to testify on them. Therefore, the assertion that the statements had been prepared based on hearsay held no water. The Registrar had considered the testimony of PW1 and found him to be a truthful witness. (para 17 & 18)

(2) This court's assessment of the evidence that was before the Registrar had raised certain questions, which neither side had the occasion to consider at the prior hearing. Due to the unresolved questions regarding the financial statements of the plaintiff, the plaintiff had failed to prove that the financial statements correctly recorded the amount of stock that was held in the business at the material time. However, there was no doubt that the plaintiff had indeed suffered some loss as a consequence of the actions by the defendants. Thus, special damages for such loss was assessed at RM55,000 using a straight-line extrapolation of the level of stocks in the business of the plaintiff based on the previous years' financial statements. The amount of general damages awarded to the plaintiff was also reduced to RM55,000 which were intended to compensate the plaintiff for the losses suffered that were the natural and direct results of the tortious acts of the defendants. The defendant's appeal was thus allowed in part, and the damages assessed were reduced. (paras 25-27)

(3) The Registrar clearly considered that the actions of the defendants justified the award of exemplary damages as their actions infringed upon the constitutional rights of the plaintiff. It was not correct to say that the defendants were merely carrying out their statutory duties, if the manner in which those duties had been carried out trammelled upon the constitutionally guaranteed rights of the plaintiff. The plaintiff's business was not an illegal business. The Registrar in ascertaining the amount of exemplary damages had not acted on a wrong principle of law and had not misapprehended the facts. The Registrar had not made a wholly erroneous estimate of the damages suffered as would justify this court to exercise its appellate powers to disturb such assessment. Accordingly, the decision of the Registrar on the award of RM2,000,000 as aggravated damages was affirmed. The exemplary damages were calculated as 25% of the total for all other heads of damages, which amounted to RM527,500. (paras 30-33)

(4) The court ought to decide based on reason and law, and not based on pleas of emotion. Nonetheless, the emotional state of a witness is a relevant consideration for the purposes of assessing the veracity of the witness's testimony, and in this case, in assessing the extent to which the plaintiff was affected by the events that had transpired, for the purposes of ascertaining aggravated damages. (para 35)

(5) The order of the Registrar dated 1 July 2015 did not contain any award for pre-judgment interest. He stated that the prayer for pre-judgment interest was refused but without providing any further explanation. However, the earlier order by the judge dated 19 September 2012 had already awarded pre-judgment interest at 8% per annum. The Registrar's finding could not override the earlier decision of the trial judge. Therefore, the decision of the judge to award pre-judgment interest still stood. Thus, the plaintiff's appeal was allowed. (para 35)

Case(s) referred to:
Blundell v. Rimmer [1971] 1 All ER 1072 ***(refd)***
Davies v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 ***(refd)***
Kertih Port Sdn Bhd v. Pemunya Kapal "Shema" [2011] 3 CLJ 184 HC ***(refd)***
Mohamed Ibrahim & Anor v. Christopher Piff & Anor [1980] 1 LNS 139 FC ***(refd)***
Tay Kheng Hong v. Heap Moh Steamship Co Ltd [1964] 1 LNS 202 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 56 r. 1(3A)

For the plaintiff - V Rajadevan; M/s Rajadevan & Assocs
For the defendants - Wong Hok Mun, Ashmadi Othman & Tan Ru En; M/s Che Mokhtar & Ling

Reported by Suhainah Wahiduddin

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JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] This was a cross-appeal from the decision of the Registrar of this court in assessment proceedings.

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Background Facts

[2] The plaintiff carried on a business of trading in scrap metal and second-hand goods, on premises rented from the Kuala Lumpur City Hall Workers Union. She had obtained the requisite licence from the Royal Malaysian Police and an exemption certificate to operate a second hand goods business under the Second-Hand Dealers Act 1946. However, she did not obtain any business licence, permit or consent from the second defendant, DBKL. Nor did she has any approval to construct any structure on the land on which she ran her business.

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[3] DBKL gave to the plaintiff several enforcement notices, requiring her to demolish the structures, failing which enforcement action would be taken against her. On 16 January 2008, the defendants carried out the enforcement action, and demolished the structures located on the land and seized certain assets of the plaintiff (which assets were never returned to her).

E

[4] The plaintiff sued the defendants for trespass, conversion and detinue, negligence, breach of statutory duty, conspiracy and misfeasance in public office. At the trial to determine liability, the learned judge found for the plaintiff, and ordered damages to be assessed.

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[5] Before the Registrar, damages were assessed as follows:

Head of Damage	Amount (AM)
Special damages	2,012,100
General damages	2,000,000
Aggravated damages	2,000,000
Exemplary damages	1,503,025
Total assessment of damages	**7,515,125**

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[6] The defendants appealed against the decision of the Registrar, on grounds that are addressed in paras. 10 *et seq*. The plaintiff cross-appealed against the decision of the Registrar to refuse the award of pre-judgment interest.

Decision Of This Court

I

[7] Having heard submissions of counsel, I allowed the defendants' appeal in part, and reduced the damages assessed in the following manner:

Head of Damage	Amount (AM)
Special damages	55,000
General damages	55,000
Aggravated damages	2,000,000
Exemplary damages	527,500
Total assessment of damages	**2,637,500**

[8] I also found that the learned trial judge had already ordered for pre-judgment interest and that accordingly the decision of the Registrar not to award pre-judgment interest was ineffective and could not have the effect of overriding the prior order granted by the trial judge. Therefore, the decision of the learned judge to award pre-judgment interest at the then prevailing prescribed rate of 8.0% per annum still stood.

[9] Both the plaintiff and the defendants have now appealed to the Court of Appeal against my decision, the grounds for which are explained in the following paragraphs.

Analysis

The Scope Of The Assessment Of Damages

[10] It was argued that the Registrar's decision exceeded the scope of the judgment, which determined liability for trespass, conversion, detinue and negligence.

[11] The causes of action on which the plaintiff founded her claim were:

(a) trespass, conversion and detinue;

(b) negligence;

(c) breach of statutory duty;

(d) conspiracy; and

(e) misfeasance in public office.

[12] In my judgment, the heads of damages identified in para. 16 of the Registrar's grounds of judgment can all be related to the actions for trespass, conversion, detinue and negligence, causes of action in respect of which the judge had found for the plaintiff. Accordingly, there is no question of the assessment of damages exceeding the scope of the judgment.

[13] I observe in passing that the grounds of judgment of the learned judge did not deal with conspiracy or misfeasance in public office. It is apparent to me, however, that the reliefs sought had been adequately addressed by reference to the causes of action in respect of which the judge found for the plaintiff, and hence there would not have been any necessity to address the claims for breach of statutory duty or misfeasance in public office.

The Financial Statements And Tax Computation Reports

[14] It was further advanced for the defendants that the Registrar took into account irrelevant facts when considering the financial statements and tax computation reports of the plaintiff, on the basis that these documents did not prove the value of the goods at the time of the tortious acts.

[15] I disagree with this contention because the financial statements can provide a useful indication of what the value of the goods were. Indeed, financial statements can often understate the realisable value of an asset of a business, to the extent that there may be depreciation applied. In the present case, the value of the scrap metal would likely have been higher than the cost (as a scrap metal trader could be expected to earn a margin) but subject to the fluctuations in the price of commodities.

[16] The more serious objection was counsel for the defendant's contention that the 2007 financial statements had been prepared with litigation in mind (in light of the fact that the accounts were dated 30 June 2008, which was after the tortious acts of the defendants), and therefore the probative value of the statements would be less than that of a report that had been independently prepared. The allied question was whether there has been adequate explanation for the more than forty-fold increase in the level of stock held by the business compared to the prior years. The defendants also sought to attack the financial statements on the basis that they were prepared based on information or explanations by the illiterate plaintiff and that the financial statements were prepared based on hearsay.

[17] Firstly, it has to be borne in mind that PW1 was an accountant and has a professional duty to ensure that the accounts give a true and fair view of the affairs of the plaintiff. Accordingly, the fact that the 2007 accounts were issued after the tortious acts by the defendants should not have any effect on the accuracy of the financial statements should the court regard PW1 as a truthful witness. By the same token, the literacy or otherwise of the owner of the business is not a material consideration, because an accountant would be expected to adhere to the applicable financial reporting standards. In any event, the preparation of the accounts of a business are not subject to the rules of evidence, and the fact that they were prepared based on information provided by the relatives of the plaintiff does not in any way detract from their status as a financial record of the affairs of the plaintiff, or the ability of PW1, as the accountant who had prepared the financial statements, to testify on them. Therefore, the assertion that the statements had been prepared based on hearsay held no water.

[18] The crux of the issue is the credibility of the testimony of PW1, the chartered accountant who had prepared the financial statements in question. The learned Registrar had, in paras. 28 and 29 of his grounds of judgment, considered the testimony of PW1 and found him to be a truthful witness. The Registrar also noted that PW1's testimony that he was present at the premises

for the stocktake was not challenged or refuted. What was questioned was the manner in which PW1 arrived at the valuation of the stock, for which the witness gave answers that the Registrar considered to be satisfactorily clear.

[19] The current proceedings before me – being an appeal to a judge in chambers from a decision of the Registrar – are by way of re-hearing and therefore I am to treat the matters in dispute as if they had never been heard before, and I am entitled to exercise my own discretion and am not bound by the decision of the Registrar (see *Blundell v. Rimmer* [1971] 1 All ER 1072). Nonetheless, I am bound not to interfere lightly with the findings of fact of the Registrar, who had the advantage of hearing the *viva voce* testimony of the witnesses. The applicable principles are set out in the decision of the judicial committee of the Privy Council in *Tay Kheng Hong v. Heap Moh Steamship Co Ltd* [1964] 1 LNS 202; [1964] 1 MLJ 87 (on appeal from Singapore), which principles have been held as applicable in Malaysia in the context of an appeal to a judge in chambers from a Registrar's order on assessment of costs and expenses (see *Kertih Port Sdn Bhd v. Pemunya Kapal "Shema"* [2011] 3 CLJ 184:

> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a Judge of first instance were stated by Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484, 487, 488; [1947] 1 All ER 582 at p. 487,
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> I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion;
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> II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
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> III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court.
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> Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co Ltd* [1919] SC (HL) 35, 37.
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> In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad

A and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment (per Lord Guest).

B

[20] In assessing the veracity of the testimony of PW1, it will be essential to refer to the contemporary documents and to the overall probabilities of the case. PW1 explained the forty-fold increase in the level of stock by the fact that the plaintiff was aggressively expanding her business because "this was a blooming (*sic*) business" (see notes of evidence for 18 December 2014, at p. 24), and because there was a high demand for copper (*ibid* at p. 21) at that time. PW1 also testified that the plaintiff had attempted to obtain banking facilities to fund her business expansion, but was ultimately unsuccessful.

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D **[21]** In assessing the evidence before me, I examined the balance sheet of the plaintiff's business for the year ended 31 December 2007 (p. 39 of ikatan teras (jilid 2)) to ascertain how the steep increase in the level of stock had been funded and noted the following:

(a) the capital at start was stated to be RM243,506. However, the previous E years' financial statements instead showed that the capital utilised for the business was only RM43,506. There was a sum of RM200,000 that was not accounted for in the capital of the business, since there was no additional capital recorded as having been introduced in the 2006 financial year;

F (b) the current account balance at the start of the financial year was stated to be RM102,222, whereas the retained earnings or reserves as at 31 December 2006 was only RM10,728. It was not clear to me from the balance sheet how the increase in the figure was accounted; and

G (c) the bulk of the funding appeared to have come from a line item described as "Loan (owner)", in the amount of RM1,181,697, which suggests that the plaintiff had advanced the sum to the business. The question that then arose was from where had she obtained those funds? It could not have been bank borrowings, as PW1 testified that the plaintiff was not able to obtain banking facilities. If she had borrowed H the sums from other sources, then rightfully these loans should appear as a liability in the balance sheet.

[22] I raised these points to counsel, in the course of their submissions. I was informed that these points were not previously considered by counsel, and accordingly PW1 had not the opportunity to explain what I considered I to be discrepancies in the balance sheet for FY2007.

[23] The question then arose whether PW1 can be recalled to provide such explanation. A

[24] In an appeal to a judge in chambers, fresh evidence cannot be admitted unless I am satisfied that the two preconditions in O. 56 r. 1(3A) of the Rules of Court 2012 have been met. Order 56 r. 1(3A) provides as follows: B

> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that-
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> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it; or that reasonable diligence would not have made it so available; and C
>
> (b) the fresh evidence, if true, would have had, or would have been likely to have had a determining influence upon the decision of the Registrar.

[25] In the circumstances of this particular case, no new fresh documentary evidence has been sought to be adduced by either party in the appeal before me. Rather, my assessment of the evidence that was previously before the Registrar raised certain questions, which neither side had the occasion to consider at the prior hearing. Now, if I had been hearing the case at first instance, it would have been open to me to seek clarification from the witness on those points, following which I would have allowed both counsel to ask follow-up questions, either in cross-examination or re-examination. That course of action was no longer open to me in an appeal from the decision of the Registrar, by virtue of O. 56 r. 1(3A). D E

[26] Due to the unresolved questions that I had had regarding the financial statements of the plaintiff, I found that the plaintiff had failed to prove that the financial statements correctly recorded the amount of stock that was held in the business at the material time. At the same time, there was no doubt in my mind that the plaintiff had indeed suffered some loss as a consequence of the actions of the defendants. I assessed the special damages for such loss at RM55,000, using a straight-line extrapolation of the level of stocks in the business of the plaintiff based on the previous years' financial statements. This sum was derived using the following formula: F G

$$\text{RM38,410} \div \text{RM26,810} \times \text{RM38,410} = \text{RM55,029}$$

$$\sim \text{RM55,000}$$

> Where RM38,4,10 was the level of stock in the business as at 31 December 2006, and RM26,810 was the level of stock as at 31 December 2005. H

[27] I also reduced the amount of general damages awarded to the plaintiff to RM55,000, which were intended to compensate the plaintiff for the losses suffered that were the natural and direct results of the tortious acts of the defendants. I

Other Evidence

[28] The defendants further sought to attack the credibility of the various items of evidence before the Registrar. In this regard, I should be slow to overturn findings of fact by the Registrar, and I may only properly do so when there has been a misapplication of the law, a misapprehension of the true facts, or where the Registrar had made a wholly erroneous estimate of the damages suffered. I am guided by the following passage from *Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601, applied in Malaysia by the Federal Court in *Mohamed Ibrahim & Anor v. Christopher Piff & Anor* [1980] 1 LNS 139; [1981] 1 MLJ 221:

> Where the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer LJ in *Flint v. Lovell* [1935] 1 KB 354. In effect the court, before it interferes with an award of damages, should be satisfied that the Judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It Is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

[29] In the present case, I am not satisfied that the Registrar has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damages suffered.

Multiplicity Of Heads Of Damages – Whether Double Compensation

[30] Counsel for the defendants submitted that the award of both exemplary and aggravated damages were wrong, as there had to be special circumstances to justify punishing the defendants, taking into account the principle that exemplary damages are punitive in nature. In the present case, the defendants – argued counsel – were only carrying out their statutory duties.

[31] The Registrar clearly considered that the actions of the defendants justified the award of exemplary damages (see paras. 58 to 70 of his grounds of judgment), as their actions infringed upon the constitutional rights of the plaintiff. It is no answer to say that the defendants were merely carrying out their statutory duties, if the manner in which those duties had been carried out trammelled upon the constitutionally-guaranteed rights of the plaintiff. It has also to be remembered that the plaintiff's business was not an illegal business, as explained by the learned judge in her grounds of judgment.

[32] Again, applying the test in *Davis v. Powell Duffryn Associated Collieries Ltd*, I am not satisfied that the Registrar, in ascertaining the amount of exemplary damages, has acted on a wrong principle of law, has misapprehended the facts or has made a wholly erroneous estimate of the damages suffered as would justify this court to exercise its appellate powers to disturb such assessment.

[33] Accordingly, the decision of the Registrar on the award of RM2,000,000 as aggravated damages was affirmed. The exemplary damages were calculated as 25% of the total for all other heads of damages, which amounted to RM527,500.

The Emotional State Of The Plaintiff

[34] Counsel for the defendants submitted that the Registrar was wrong to have taken into account the emotional state of the plaintiff when she appeared as a witness at the assessment proceedings. It was pointed out, and right so, that the court ought to decide based on reason and law, and not based on pleas of emotion.

[35] Nonetheless, the emotional state of a witness is a relevant consideration for the purposes of assessing the veracity of the witness' testimony, and in this case, in assessing the extent to which the plaintiff was affected by the events that had transpired, for the purposes of ascertaining aggravated damages.

Interest

[36] The order of the Registrar dated 1 July 2015 did not contain any award for pre-judgment interest. In his grounds of judgment, he stated that the prayer for pre-judgment interest was refused but without providing any further explanation. However, the earlier order by the learned judge dated 19 September 2012 had already awarded pre-judgment interest at 8% per annum. The Registrar's finding cannot override the earlier decision of the trial judge. For this reason, I allowed the plaintiff's appeal but noted that no further order as to interest will be necessary, as the order of 19 September 2012 remained in force.